No. 18-457

IN THE

Supreme Court of the United States

NORTH CAROLINA DEPARTMENT OF REVENUE,
Petitioner,

v.

THE KIMBERLY RICE KAESTNER 1992 FAMILY TRUST,
Respondent.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE AMICI CURIAE[1]

Amici curiae are law professors who teach and write about how the Due Process and Dormant Commerce Clauses allocate authority among the states and between the states and the federal government. It is their professional opinion that the Dormant Commerce Clause rather than the Due Process Clause of the Fourteenth Amendment is the appropriate source of constitutional standards for resolving this and similar cases. This brief does not take a position on the validity of North Carolina's tax. Instead, amici urge the Court to vacate the state court's judgment, which relied on the Due Process Clause, and remand for further review under the Dormant Commerce Clause.

The three amici are also co-counsel and are listed on the front cover. Their institutional affiliations are provided solely for identification. They have no financial interest in the outcome of this case or other similar matters.

INTRODUCTION AND SUMMARY OF ARGUMENT

The ostensibly narrow question presented in this case obscures a broader constitutional problem. Nominally, this case is about whether North Carolina may tax a trust's undistributed net income because the trust's beneficiary resided in North Carolina

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[1] This brief is filed pursuant to blanket consents provided by all parties. No person other than the amici have authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

during the relevant tax years. But the broader problem is that many states seek to tax trust income based on the local residence of various persons connected to the trust. These include (1) current beneficiaries, as in this case; (2) the settlor of an inter vivos trust, or the decedent for a testamentary trust; and (3) the trustees. States have also sought to tax the income of trusts that (1) are governed by the laws of the taxing state; (2) hold physical assets within the taxing state; and/or (3) are administered in the taxing state.

The existence of multiple triggers for taxation raises a problem of overlapping jurisdiction that the Due Process Clause is ill-suited to address. For example, if a settlor in State *W* designates a trustee in state *X*, who holds assets in an account in state *Y*, for a beneficiary in State *Z*, four different states might seek to tax the trust's income and might not provide offsetting credits. The Due Process Clause, as opposed to the Dormant Commerce Clause, is a poor fit for sorting out this regulatory overlap for at least three reasons.

First, the Court's due process jurisprudence is designed to identify when a given state may act in isolation, rather than when the overlapping authority of multiple states creates a risk of cumulative burdens. For example, if a transaction affecting several states leads to a civil suit, the Due Process Clause's "minimum contacts" test might permit more than one state to exercise personal jurisdiction, such that the plaintiff can choose between them. This emphasis on the constitutional minimum means that

multiple states can have concurrent power without diminishing each other's authority.

In contrast, taxation of trusts raises a different kind of problem. When a trust has contacts with several states, each state may seek to tax the same income. The issue is not that any of the taxing states lacks a "minimum" connection to the trust. Instead, the issue is that the cumulative effect of taxation by multiple states can burden taxpayers and interstate commerce. Thus, unlike in the personal jurisdiction context, the existence of concurrent tax authority limits each state's discretion to act without regard to other states. An inquiry into "minimum" contacts in this context would distract from the real problem of coordinating concurrent state authority in a federal system.

Second, the Dormant Commerce Clause is a better fit than the Due Process Clause for the coordination problem that this case raises. This Court was faced with a similar choice between the two clauses when it considered whether a state could require an out-of-state retailer to collect use taxes arising from sales to local consumers. Initially, the Court held that both the Due Process and Dormant Commerce Clauses barred such taxes, but later concluded in *Quill Corp. v. North Dakota* that only the Dormant Commerce Clause was an obstacle. *See* 504 U.S. 298, 308, 318 (1992). The Court then overruled *Quill* on the merits of the Dormant Commerce Clause issue in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2099 (2018).

The Court's preference for Dormant Commerce Clause analysis should extend to the present context of taxes on trusts, in which courts must decide

whether the existence of concurrent authority limits each state's discretion. Current Dormant Commerce Clause jurisprudence provides robust tools for addressing this problem. The test from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), ensures that states tax only income that has a substantial nexus to the state, that the tax is related to the benefits that the state provides, and that the tax is non-discriminatory and fairly apportioned. Moreover, the undue burden test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), helps balance the interests of states and the trust beneficiaries who will ultimately bear the cost of taxes on undistributed trust income. These tests thus address whether a state may impose any tax at all, and, if so, whether the amount of a tax is appropriate. *See Wayfair*, 138 S. Ct. at 2091, 2099 (noting importance of *Complete Auto* and *Pike* in the context of reviewing state taxes).

If a tax on trust income survives scrutiny under the Dormant Commerce Clause, then minimum contacts analysis would be superfluous. Amici cannot envision a scenario where a minimum contacts inquiry would produce insights that would not also emerge from an inquiry into nexus, relatedness, discrimination, apportionment, and burdens under the Dormant Commerce Clause.

Third, relying on the Dormant Commerce Clause rather than the Due Process Clause would preserve flexibility for Congress to provide comprehensive solutions if it identifies a problem arising from multistate taxation of trust income. In contrast, a ruling on Due Process grounds that North Carolina may not impose the tax at issue here, or that other

states may not tax trusts in other circumstances, would tie Congress's hands in the face of tax avoidance schemes that may undermine reasonable state interests.

A similar problem affected sales and use taxes before *Quill* removed the Due Process barrier to taxing non-resident sellers and thereby empowered Congress to strike the appropriate balance among national, state, and taxpayer interests. When Congress did not act, this Court in *Wayfair* revisited *Quill* and overruled *Quill*'s Commerce Clause holding. Both the majority and dissenting opinions in *Wayfair* noted Congress's continued ability to provide a comprehensive solution, which is not possible if a Due Process holding eliminates some of the options that Congress could otherwise exercise. *See Wayfair*, 138 S. Ct. at 2096–98; *id.* at 2102–05 (Roberts, C.J., dissenting).

In the courts below, respondent objected to North Carolina's tax under both the Due Process and Dormant Commerce Clauses. The trial court held that burdens on commerce provided another basis for setting aside the tax assessment, but the state appellate courts relied only on the Due Process Clause. The Dormant Commerce Clause issue is therefore preserved for review on remand. However, as amici show below, further development of the record is necessary to support a proper Dormant Commerce Clause analysis.

Finally, there is a pending petition for a writ of certiorari in a case in which the Supreme Court of Minnesota ruled that the Due Process Clause barred the state from taxing a trust's income because the sole

trustee was a nonresident. *Fielding v. Comm'r of Revenue*, 916 N.W.2d 323 (Minn. 2018), *petition for cert. filed sub nom Bauerly v. Fielding* (No. 18-664). The court reached that conclusion despite the fact that the settlor and one of the beneficiaries resided in Minnesota and many relevant activities regarding the trust occurred in Minnesota. The petition was distributed for the conference on February 22, 2019 but was not addressed in the ensuing Order List. Amici believe that the present case and the Minnesota case involve closely related issues and that concurrent consideration would assist the Court in identifying a proper framework for addressing taxation of trusts with multistate contacts.

ARGUMENT

THE JUDGMENT BELOW SHOULD BE VACATED, AND THE CASE REMANDED FOR CONSIDERATION UNDER THE DORMANT COMMERCE CLAUSE.

A. State Taxation of Trust Income Relies on Multiple Variables and Often Involves Claims by Several Taxing Jurisdictions.

On its face, this case presents the limited question of whether a state may tax the undistributed income of a trust whose only connection with the taxing state is that the person entitled to the income is a resident of that state. However, North Carolina's tax is merely one variation among a web of state laws that take myriad approaches to taxing income from trusts, as the cases cited in the petition, opposition, and lower court opinions in this case and *Bauerly* illustrate.

The proper taxation of trust income is a complicated matter because trusts often have connections with several states. These include where the settlor or the decedent resided, where the trustees reside, where the trust is administered, where its assets are located, where the beneficiaries reside, where a testamentary trust was probated, and the states identified in the trust's governing documents. *See* Jerome R. Hellerstein et al., *State Taxation* ¶ 20.09[2][b] (3d ed. 2018) ("trusts frequently are considered to be resident in several states simultaneously" and pay taxes to each state without receiving offsetting credits).

Moreover, analysis must account for situations in which the trustee controls the assets of many small trusts, whose beneficiaries and settlors could be anywhere in the United States. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 307–08 (1950). In the days when trusts held real property and/or tangible stock certificates or bonds, considering the location of the trust's physical assets may have been sensible. But with so much now in the cloud or in electronic records, that approach seems archaic. And, for additional complexity, beneficiaries move, trustees change, and there may be more than one of each, not all of whom live in the same state. Thus, a decision from this Court about the validity of North Carolina's tax would impact how courts decide cases addressing a wide variety of state tax statutes governing countless idiosyncratic trusts.

Given the many variables noted above, litigants and judges need guidance about how to assess the validity of state taxes on trust income. Accordingly,

the first question for the Court to address is whether, as the North Carolina courts concluded, the Due Process Clause is the appropriate source of constitutional limits on the states' authority to tax trust income.

B. The Due Process Clause Is Not the Appropriate Source for Rules Governing Challenges to State Taxes on Trust Income.

Two lines of this Court's due process cases are potentially relevant. Both strands posit that the Due Process Clause bars a state from asserting power when the regulated entity or activity lacks a sufficient connection to the state. One set of cases governs efforts to assert adjudicative (personal) jurisdiction, and the other involves efforts to assert legislative (choice of law) jurisdiction. Neither is a good fit for the problem of overlapping taxing authority over trusts with multistate contacts.[2]

First, in the personal jurisdiction context, due process allows states to exercise specific jurisdiction over a defendant whose "minimum contacts" with the forum are related to the pending suit. *BNSF Ry. Co.*

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[2] Petitioner identifies "elements" of a due process test for taxes on trusts. Pet. Br. 15 (citing *Quill*). However, the case on which petitioner relies explicitly adopted "[c]omparable reasoning" to the Court's personal jurisdiction decisions, which begs the question that amici address of whether the "minimum contacts" test has been used in a context for which it is not suited. *Quill*, 504 U.S. at 307–08 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945)); *see also Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 465 (1959) (citing *Shoe* while analyzing a state tax on an out-of-state corporation's income).

v. Tyrrell, 137 S. Ct. 1549, 1558 (2017) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). The problem with this test in the trust context is that several states can have contacts with the same trust and efforts to characterize some contacts as less than "minimum" would often be arbitrary.

For example, consider a hypothetical testamentary trust created by a decedent domiciled at the time of death in State *W*. The trustee resides in state *X* and holds property in an account in state *Y* for a beneficiary in State *Z*. Each state claims an interest in taxing the trust based on its connection to important actors, assets, or activities. In all four contexts, the trust's contacts are "purposeful" and the trust enjoys the "benefits and protections" of the taxing state's laws. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475–76 (1985) (citations omitted). Indeed, to the extent that benefits are relevant, each state can invoke the basic protections provided to every resident, whether a settlor, beneficiary, or trustee. Either all four states have minimum contacts and provide relevant benefits, or a court that fears the consequences of that conclusion would arbitrarily decide that some contacts are less-than-minimum or that some benefits count less than others.

The present case and the pending petition from Minnesota in *Bauerly*, *supra*, illustrate the unhelpful nature of the minimum contacts approach. The North Carolina court held that the beneficiary's residence is insufficient, and the Minnesota court held that the settlor's residence is also insufficient. Both cases appear to converge on a view that the location of the trustee is a critical predicate for taxation. *See*

Kimberley Rice Kaestner 1992 Family Tr. v. North Carolina Dep't of Revenue, 814 S.E.2d 43, 50–51 (N.C. 2018) (emphasizing that the trustees administered the trust in New York); *Fielding*, 916 N.W.2d at 333 (emphasizing that "trust administration activities by the Trustees occurred in states other than Minnesota"). Granting the trustee's home state a monopoly on taxation of undistributed trust income would revive the formality that this Court eschewed when it rejected "the mere mechanical operation of locating at a single place, and there taxing, every legal interest growing out of all the complex legal relationships which may be entered into between persons." *Curry v. McCanless*, 307 U.S. 357, 373 (1939). If a trustee implements directives of a nonresident for the benefit of a nonresident, such that the trustee's home state is merely a conduit of assets between other states, then there is no good reason to invoke due process formalities instead of a more functional approach that better serves the relevant national, state, and taxpayer interests.

Second, in the context of legislative jurisdiction, the issue here is similar to the choice of law issue in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The Court in *Shutts* held that the Due Process Clause precluded Kansas courts from applying Kansas law to the claims of all members of a class, where more than 99% of the property at issue was located outside of Kansas and 97% of the class members were not Kansas residents. *Id.* at 815, 820–23. In reaching that conclusion, the Court held that the Due Process Clause provides only "modest restrictions on the application of forum law" and grants considerable leeway for "more than one jurisdiction's laws" to

apply, but that Kansas had gone too far. *Id.* at 818, 822; *see also Allstate Ins. Co. v. Hague*, 449 U.S. 302, 314 (1981) (plurality opinion) (noting that the Due Process Clause permits a state to apply its law in circumstances when affected actors might "use state services and amenities and may call upon state facilities").

Applying *Shutts* and *Allstate* to the present case would still allow North Carolina to impose its tax because it had a close connection to the trust during the relevant tax years, when the trust existed for the sole purpose of benefiting a North Carolina resident and her children. Again, the real problem in cases like this one and *Bauerly* is not that trusts will often lack relevant contacts with a taxing state, but that trusts will often have relevant contacts with many states, raising the possibility of double taxation or other burdens on interstate commerce.[3]

The issue in personal jurisdiction and choice of law cases is whether a given state has a minimum connection to a dispute. Often, several states can clear that low bar, which is not troubling in the context of current jurisprudence governing adjudicative and legislative jurisdiction. For example, suppose that a resident of Minnesota enters into a contract with a resident of North Carolina and then sues for breach in a Minnesota court under Minnesota law. The fact that North Carolina might also have been able to provide

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[3] The Court has held that double taxation of trust income does not violate the Due Process Clause, *see Curry v. McCanless*, 307 U.S. 357, 372–74 (1939), but may violate the Commerce Clause, *see Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787, 1798–800 (2015).

a forum and apply its law does not undermine the "minimum" nature of Minnesota's contacts. Thus, there is no bar against "double personal jurisdiction" or "double choice of law." But "double taxation" is potentially a problem when states have concurrent power to tax the same trust income. The Due Process Clause's emphasis on minimum connections does not provide an appropriate mechanism to address overlapping state authority.

Finally, Due Process Clause rulings limit Congress's options, while Dormant Commerce Clause rulings preserve Congress's discretion. Given the complexity of the policy issues governing taxation of trusts, Congress should have an opportunity, if it chooses, to create a national solution on a clean slate. Piecemeal due process decisions that preclude states from taxing trust income in some circumstances would frustrate Congress's ability to craft a coherent solution to a national problem affecting a huge volume of highly mobile assets. The availability of the Dormant Commerce Clause means that there is no reason for this Court to tie Congress's hands with a due process ruling. *See infra* at 18–19 (noting examples of how Congress has regulated multistate taxation).

In sum, existing doctrine under the Due Process Clause does not offer a promising framework for sorting through the complexities of overlapping state authority to tax trust income. The Court could try to develop a new jurisprudence of interstate trust taxation under the Due Process Clause, but there is no reason to do that because, as the next section shows, current Dormant Commerce Clause doctrine

provides an established approach to thinking about systematic federalism problems involving concurrent authority. Indeed, the Dormant Commerce Clause already provides the framework for how states tax other complicated interstate business entities, including corporations and partnerships, limited liability companies, real estate investment trusts, and other multistate businesses.

C. The Dormant Commerce Clause Should Govern the Constitutionality of State Taxes on Trust Income.

The Court's "minimum contacts" jurisprudence primarily addresses formal connections between the defendant and the state seeking to adjudicate a specific controversy. In contrast, this case is primarily about practical economic matters, which is the focus of the Commerce Clause. Most of the trusts that are likely to catch the attention of revenue departments have multi-million dollar corpuses and are often managed by banks and other large financial institutions. Indeed, in this case, a $13 million trust sought a $1.28 million tax refund for the four years at issue. Pet. at 6.

This Court has developed tools for applying the Dormant Commerce Clause to cases in which the primary issue is whether and how a state may tax a particular set of actors or transactions. Indeed, the Court has addressed the question of whether the Due Process Clause or the Dormant Commerce Clause is the preferred method of analysis in an analogous context: whether a state may require an out of state seller, which sends its products to a resident of that state, to collect the sales tax that the resident owes.

In answering that question, the Court considered both the Due Process and Dormant Commerce Clauses and eventually preferred the latter.[4]

Initially, in *Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, the Court ruled that both Clauses precluded the state from imposing a collection requirement on the seller. *See* 386 U.S. 753, 756–60 (1967). Twenty-five years later, in *Quill Corp. v. North Dakota*, the Court rejected *Bellas Hess*'s due process holding but preserved its Commerce Clause ruling. *See* 504 U.S. 298, 308, 318 (1992). The Court acknowledged that the two grounds overlapped in certain respects, but concluded that the Commerce Clause set a higher and more nuanced bar than the Due Process Clause. *See id.* at 312–13. Finally, in *South Dakota v. Wayfair, Inc.*, the Court overruled *Quill*, taking a functional approach under the Dormant Commerce Clause that rejects "anachronistic formalisms." 138 S. Ct. 2080, 2095 (2018).[5]

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[4] Our analysis of the role of the two clauses broadly follows that of the leading treatise on state taxation. *See* Jerome R. Hellerstein et al., *State Taxation* ¶ 20.09[2][b] (3d ed. 2018) ("[We do not] believe . . . that there is any basis for construing the Due Process Clause to preclude state taxation of accumulated trust income on the basis of the residence of the trustee, the trust beneficiaries, or the place where the trust is administered.... But that is not—or should not be—the end of the inquiry. Even if the risk of multiple taxation of accumulated trust income raises no due process issue, it does create Commerce Clause concerns.").

[5] Because cases applying the Due Process and Commerce Clauses to state taxes have over time shared common features and assumptions, it is not surprising that state courts sometimes follow the due process path when the Dormant Commerce Clause path would be more appropriate. *See* Allan Erbsen, Wayfair *Undermines* Nicastro*: The Constitutional Connection Between*

Another recent decision addressing a state income tax invoked the Dormant Commerce Clause to set aside a Maryland law that denied its residents who earned income outside the state full credit for taxes paid to other states. *See Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787 (2015). The majority concluded that the Commerce Clause prevented discriminatory double taxation that the Due Process Clause would have tolerated. *See id.* at 1798–2000. While four Justices dissented from the invalidation of Maryland's denial of credits, only Justices Scalia and Thomas objected to analyzing the issue under the Dormant Commerce Clause and none suggested that the Due Process Clause would forbid what the Dormant Commerce Clause would allow. *See id.* at 1808 (Scalia, J., dissenting); 1811 (Thomas, J., dissenting); 1813–14 (Ginsburg, J., dissenting).[6]

The starting point for applying the Dormant Commerce Clause to situations involving state taxation of interstate income is the four-prong approach articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). "The Court will sustain a tax so long as it (1) applies to an activity with a substantial nexus with the taxing State, (2) is fairly

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State Tax Authority and Personal Jurisdiction, 128 YALE L.J.F. 724 (2019).

[6] *Wynne* is also notable for this Court's careful decision to avoid dictating a specific approach to taxation of interstate income. *See, e.g.*, *Wynne*, 135 S. Ct. at 1806 ("while Maryland could cure the problem with its current system by granting a credit for taxes paid to other States, we do not foreclose the possibility that it could comply with the Commerce Clause in some other way"). A Due Process holding that categorically forbids taxation of a resident beneficiary would create the inflexible constraints on legislative discretion that the Court sought to avoid in *Wynne*.

apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the State provides." *Wayfair*, 138 S. Ct. at 2019 (citing *Complete Auto*). This inquiry focuses on "structural concerns about the effects of state regulation on the national economy." *Quill*, 504 U.S. at 312.

In the present context, the "substantial nexus" and "relatedness" prongs determine whether a state has a foundation for asserting its authority to tax trust income and can justify the amount of the tax. An "interstate business must have a substantial nexus with the State before *any* tax may be levied on it" and "the *measure* of the tax must be reasonably related to the extent of the contact." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981). The nexus and relatedness prongs thus apply even when there is no double-taxation, such that the only question is whether a state has exceeded limits on its authority to impose a tax.

The fair apportionment prong helps courts decide how to allocate authority to tax when trust income has a substantial nexus with more than one state. The Court has explained that the fair apportionment inquiry has two parts:

> The first, and again obvious, component of fairness in an apportionment formula is what might be called internal consistency—that is the formula must be such that, if applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed. The second and more difficult requirement is what might be called external

> consistency—the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated.

Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983). This rubric guides how states apportion the nationwide income of businesses with substantial activity in more than one state. The all-or-nothing approach of due process cases does not permit this nuanced analysis.

Another Dormant Commerce Clause case, *Pike v. Bruce Church, Inc.* 397 U.S. 137 (1970), offers further insight into how to approach state taxes on trusts. *Pike* applies when a nondiscriminatory law allegedly places an unreasonable burden on interstate commerce:

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142 (citation omitted). *Pike* involved a challenge to a regulation rather than a tax. However, as Justice Scalia observed in *Quill*, "[i]t is difficult to discern any principled basis for distinguishing between

jurisdiction to regulate and jurisdiction to tax." *Quill*, 504 U.S. at 319 (Scalia, J., concurring in part and in the judgment). Not surprisingly, the Court in *Wayfair* recognized that *Pike* provides a judicial backstop if a state enacts laws that are much more burdensome than those of South Dakota. *See Wayfair*, 138 S. Ct. at 2091, 2099. The Court's concerns about burdens in *Wayfair* are also relevant in the context of trusts, as duplicative taxation of the same income can create an unconstitutional burden. *Pike* thus provides protection against unreasonable state taxation of trusts.

Dormant Commerce Clause analysis would also avoid the rigidity that appears in cases such as this one and *Bauerly*. As the Court made clear in *Wayfair*, courts in Dormant Commerce Clause cases "should not rely on anachronistic formalisms" but should instead utilize "basic principles of the Court's Commerce Clause jurisprudence [which] are grounded in functional, marketplace dynamics." 138 S. Ct. at 2095. Moreover, a functional Commerce Clause analysis, in contrast to the formalistic Due Process approach, is more likely to make reasonable adjustments when taxpayers try to game the system by manipulating their contacts with states (for example, by changing trustees or relocating the place of the trust's administration without altering the trust's purpose).

Although Congress did not act in response to the ruling in *Quill*, Congress has acted to establish uniform rules in other interstate tax contexts. Most relevant for current purposes is Section 117(b) of the Mobile Telecommunications Sourcing Act of 2000

(MTSA), which established a uniform rule for state and local taxation of mobile telephone calls. *See* Pub. L. 106-252, 114 Stat. 626, *codified at* 4 U.S.C. § 117(b). The MTSA was in large part a response to this Court's decision in *Goldberg v. Sweet*, 488 U.S. 252 (1989), which provided a narrow nexus test that was overtaken by the rapid development of mobile phones. Both the states and commercial interests supported sensible national standards, and the resulting federal law has won praise as "a poster child for horizontal Federal-State tax coordination at its best." *Tax Reform: What It Means for State and Local Tax and Fiscal Policy: Hearing Before the S. Comm. on Fin.*, 112th Cong. 9 (2012) (statement of Professor Walter Hellerstein).[7]

Preserving flexibility for Congress is especially important in the context of taxes on trusts. Given the many variations in how states attempt to tax trust income, it might take this Court many years and many cases to sort through the possibilities, if it ever does. Meanwhile, settlors, trustees, beneficiaries, and their advisors need to know the tax consequences of creating, operating, and modifying a trust. Lack of clarity and predictability is an obstacle to effective planning. And to the extent that either the current residence of a beneficiary, the work address of one or more trustees, or the physical or virtual location of assets is found to be relevant, not knowing the consequences of relocations and replacements can be very unsettling. The ability of Congress to provide

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[7] Another example is that Congress has permitted states to tax interstate motor fuels only in conformity with the International Fuel Tax Agreement. *See* 49 U.S.C. § 31705(b).

clarity and stability by addressing the whole area of state taxation of trusts is a major advantage of relying on the Dormant Commerce Clause rather than the Due Process Clause.

In sum, there is no role for the minimum contacts test to fill that the Dormant Commerce Clause does not already fill with more nuance and closer attention to the relevant constitutional values. If a tax survives scrutiny under *Complete Auto* and *Pike*—i.e., if there is a substantial nexus, relatedness, fair apportionment, no discrimination, and no undue burden—then minimum contacts analysis would be a superfluous distraction that would potentially tie Congress's hands.

D. The Court Should Remand this Case for Full Consideration of Respondent's Dormant Commerce Clause Claim.

The question presented in the petition is "Does the Due Process Clause prohibit states from taxing trusts based on trust beneficiaries' in-state residency?" Amici urge the Court to answer this question by ruling that the Dormant Commerce Clause, rather than the Due Process Clause, is the relevant source of limits on state authority to tax trust income.

However, this Court should not apply the Dormant Commerce Clause on the present record. The state appellate courts did not do so, the petition did not request it, the parties presumably will not brief the issue in depth, and the record is incomplete. The Court should instead remand for further proceedings

to address respondent's Dormant Commerce Clause arguments, which were preserved on appeal.[8]

Amici do not propose a particular outcome on remand. Instead, we highlight a few issues that might be relevant and that further illustrate how the Dormant Commerce Clause supplies an appropriate framework for analyzing state taxation of trusts.

First, while the Constitution clearly allows North Carolina to tax income *distributed* to a local trust beneficiary, *see Guaranty Trust Co. v. Virginia*, 305 U.S. 19, 23 (1938), the challenged tax on *undistributed* income raises a more difficult question. For example, suppose that a beneficiary moves out of the state after the state uses the beneficiary's residence as a basis for taxing undistributed income (as happened here, Br. in Opp. 4). The departure might in hindsight either confirm that the tax was necessary, because waiting for distribution would have deprived the state of revenue, or suggest that the tax was premature.

Second, mobility creates complications for both trusts and states. Trustees relocate or are replaced, current beneficiaries relocate or yield to future beneficiaries, and assets are bought, sold, and transferred among custodians. Trusts therefore cannot easily predict who will tax them in the future, and states cannot easily predict the duration of their authority over a particular trust. Analysis of

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[8] *See* Br. of Plaintiff-Appellee, at 6–7, *Kimberley Rice Kaestner 1992 Family Trust v. N.C. Dep't of Revenue*, 814 S.E.2d 43 (N.C. 2018) (No. 307PA15-2).

constitutional limits on taxation should consider the implications of this uncertainty.

Third, the record should be developed to determine whether there is a risk of multiple taxation in this case and, if so, on what basis. Specifically, the trial court, which briefly considered Dormant Commerce Clause issues, did not consider whether the North Carolina tax system is internally consistent, meaning whether "if applied by every jurisdiction, it would result in no more than all of the unitary business's income being taxed." *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983); *see also Kimberley Rice Kaestner 1992 Family Tr. v. North Carolina Dep't of Revenue*, No. 12 CVS 8740, 2015 WL 1880607, at *9 (N.C. Super. Ct. Apr. 23, 2015) ("Because . . . Plaintiff fails to satisfy the first and fourth prongs of *Complete Auto*, the Court need not address prongs two and three of that test."). Relevant questions include what kind of credits, if any, North Carolina might provide for taxes paid to other states and on what other basis, if any, North Carolina taxes the income of trusts.

Fourth, a tax that satisfies all four prongs of *Complete Auto* might still be administered in a way that imposes an "undue burden" on interstate commerce. *Wayfair*, 138 S. Ct. at 2098. Proceedings on remand should therefore address the practical effects of North Carolina's tax.

* * *

The relevant facts are all readily learnable, but they have not been the focus of this litigation to date. They also have not been analyzed under the

appropriate Dormant Commerce Clause precedents, such as *Complete Auto*, *Pike*, and the recent June, 2018 decision in *Wayfair*. A remand to the North Carolina courts would enable the current parties, and perhaps other interested organizations or states, to offer evidence and make legal arguments that can inform the state court of the relevant Dormant Commerce Clause considerations.

CONCLUSION

For the foregoing reasons, the Court should vacate the judgment below and remand the case to the North Carolina courts for consideration of respondent's Dormant Commerce Clause claim.

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